No. 11,692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. G. DENSON,

Appellant,

vs.

IRENE GLADYS MAPES, also known as Mrs. Charles W. Mapes, CHARLES W. MAPES, JR., GLORIA MAPES, and CHAS. W. MAPES COMPANY (a co-partnership),

Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

INCOMPLETENESS RE QUOTATIONS IN APPELLANT'S OPENING BRIEF.

At page 7 (near bottom) appellant misquotes the court's finding which was and is:

> "That on or about the 24th day of September, 1945 the above named plaintiff and the above named defendants entered into the written agreement above set forth, Exhibit 'C'."

Nowhere did the trial court find (as stated) there was any written agreement "for the leasing of the

hotel premises". Per contra, what the trial court said, referring to said "Exhibit C", is

> "* * * but it is not complete * * * there is here a definite provision that further negotiations were to be had and that no lease was to be executed except as a result of the required further negotiations as to terms, conditions and details of contemplated lease or other than those established by the agreement." (R. p. 921.)

The purported partial quotation from Finding No. 9 (R. p. 917) in the form as stated (Op. Br. p. 18(b)), is not clear without including the remainder, viz.:

> "* * * of September 24, 1945, but that it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiations as to terms, conditions and details provided for in the agreement."

We say the said omitted portion is very important and that it amounts to a finding by the trial court that the matters left by Exhibit C for "further negotiations" were of a vital, substantial and important character, else how construe the language supra

> "* * * it is impossible to determine whether plaintiff would be willing to execute a lease tendered by defendants after the further negotiations * * * "? (R. p. 917.)

The trial court used no italics such as are found under quotes (Op. Br. p. 8(b), (g) and elsewhere, and the words "to be leased" (Op. Br. p. 18) under quotes, are not found in the opinion of the trial court.

REVIEW OF APPELLANT'S OPENING BRIEF.

Appellant's "Statement of the Case" page 3, states the parties entered into a written agreement "For a lease of a hotel". We deny it and say it was a mere preliminary agreement by the parties, so declared by them, to later agree if they could upon a lease and that plaintiff is estopped to deny said provision in the contract.

Appellant refers (Op. Br. p. 3), and this is many times repeated, to defendants' alleged "repudiation" of the agreement. Our reply is that the document never became a valid contract and that therefore there could be no "repudiation". The term repudiation is

> "* * * everywhere odious, and which is never applied to the refusal to perform a valid contract, but to the denial of the binding force of a valid obligation."
>
> *Wapello County v. Burlington etc. R. Co.*, 44 Iowa 585, 610 (dis. op.).

See, also:

54 *C. J.* 686.

Appellant argues (Op. Br. pp. 22, 23 et seq.) that the Exhibit C document is "complete" etc. But if so, how explain clause 3 (R. p. 910) to the effect that the parties shall later meet and discuss terms, conditions and details and if they can then mutually agree, a lease shall be signed? How explain the clause in Paragraph 10 of Exhibit C (R. p. 913):

"* * * this preliminary agreement"?

"Preliminary" is defined as "temporary"; "provisional" (49 C.J. 1325); that which precludes the main work. (Webster.)

The word "also" denotes "besides"; "in addition to". (*McCurdy v. The Alpha etc. Co.,* 3 Nev. 27, 37; *Dalton v. Bowker,* 8 Nev. 190, 210—Webster.) As "denoting new, distinct and additional matter". (3 C.J.S. 896; *West Heights etc. Corp. v. Adelman* (N.J.) 152 A. 196.)

Bondy v. Harvey (C.C.A. 2nd), 62 F. (2d) 521, is cited (Op. Br. p. 25). This was a fraud action at law and did not involve specific performance. Becauses the court found that in the contract involved "nothing was left open to be agreed upon by the parties", the mutual satisfaction clause mentioned by appellant was (Id. p. 523) without effect. In the instant case we have the garage clause (R. pp. 911-912) that terms therefor are "to be mutually agreed upon". We have the clause (R. p. 910) that lease shall be made "provided that the terms, conditions and details * * * can be mutually agreed upon * * *."

Adamson v. Alexander etc. Co. (C.C.A. 2nd), 275 F. 148 (Op. Br. p. 27). Action at law for breach of contract. The trial court held agreement was a mere option, but for this error the judgment of dismissal was reversed.

Appellant's complaint (Op. Br. p. 28) that defendants refused to confer or negotiate is unfounded in the light of the finding (R. p. 918) that plaintiff never requested any "further discussion", and also in view of the fact that plaintiff had some four months from December, 1946 to April 10, 1947 within which to request such "discussion".

Wright v. Farmer's etc. (C.C.A. 7th), 74 F. (2d) 425 (Op. Br. p. 32) is cited to point that defendants here should be held estopped to set up "their own wilful breach" as a defense. We answer that under Finding 13 (R. p. 918) the "breach" was "the fault of both parties", and that after lapse of some four months (more than a reasonable time, we say), defendants notified plaintiff they declined to proceed further. Further, the *Wright* case was at law and did not involve specific performance. Defense was the statute of frauds, and plaintiff claimed certain conduct relied upon by it estopped defendant to rely on such defense.

To constitute equitable estoppel there must concur an act or statement inconsistent with the claim afterwards asserted, action thereon by the other party and injury to such other party. "There can be no estoppel if either of these elements are wanting" (21 C.J. 1119, Sec. 122). There was no "reliance" by plaintiff, and no injury to plaintiff. (Finding 7, R. p. 916.) Plaintiff was not misled to his injury. (21 C.J. 1135.) Mere silence of itself will not raise an estoppel. (21 C.J. 1150, Sec. 154.)

Halsey et al. v. Robinson (Cal.), 122 P. (2d) 11 (Op. Br. 33). Tenants had improved the realty in consideration of landlord offering of lease renewal; also had executed a quitclaim deed by reason of certain false representations of one of the plaintiffs landlords.

Nichols v. Hartig etc., 217 N.Y.S. 191 (Op. Br. p. 35. Recognized that one in the situation of plaintiff

here, after having a reasonable time to demand further discussion, etc., has no ground for complaint that other party refused to further proceed.

Pokegama etc. Co. v. Klamath River etc. Co. (C.C. N.D. Cal.), 96 F. 34 (Op. Br. p. 36). This was not a decision by this court as appellant states. Plaintiff had expended upward of $70,000 in a sawmill in reliance upon defendant's acquiescence etc. Defendant took forcible possession of mill, claiming a forfeiture of lease, but the court held defendant was estopped.

Swain v. Seamens, 9 Wall. 254, 19 L. ed. 555 (Op. Br. p. 36). Accepting as we do the principle of law there declared, where is there any showing here that plaintiff "would be pecuniarily prejudiced"? His feeble effort (R. p. 8) was found untrue by the trial court. (R. p. 916, Fdg. 7.)

Letta v. Cincinnati etc. Co. (C.C.A. 6th), 285 F. 707 (Op. Br. p. 37). Another case recognizing the acts relied upon must mislead party asserting estoppel to his prejudice. Plaintiff's attempted claims of prejudice in case at bar were found to be untrue by the trial court. (R. p. 916, Fdgs. 5, 7.)

First Federal Tr. Co. v. First Nat'l Bank (C.C.A. 9th), 297 F. 353. A complicated case, but in tacit recognition of principle that the conduct relied upon must have induced party asserting to alter his position to his prejudice.

The citations in Op. Br. page 37 all appear to be to same effect. In view of the Finding No. 7 (R. p. 916) that plaintiff suffered no pecuniary loss and in

view of the further Finding No. 10 (R. p. 917) that defendants made no representation by word, conduct or otherwise that a lease would be tendered without further discussion as to terms not fixed by Exhibit C, we fail to see any application of such authorities.

Plaintiff complains (Op. Br. p. 38) that defendants promised to negotiate. We answer: 1st. Before a party may be heard on such point he must show he has a valid contract; 2nd. That the court found (Fdg. No. 13, R. p. 918) that no request to negotiate was ever made from September 24, 1945 to April 10, 1946; 3rd. that plaintiff had a reasonable time and more, i.e., from December, 1945 to April, 1946 to request negotiating. The original time therefor was (R. p. 910) within ten days after construction of hotel commenced, and this commenced about Dec. 10, 1945; 4th. Under the circumstances, defendants had an undoubted right on April 10, 1946 to treat said Exhibit C as of no effect.

Plaintiff seeks (Op. Br. pp. 39-45) to invoke the rule that a promisor shall place no obstacle in way of happening of a condition precedent; that where he prevents fulfillment of a condition precedent he cannot rely on such condition. Granted, but such rule has no application here where the alleged contract is incomplete; also, plaintiff who thought (R. p. 910) ten days after construction of hotel commenced was ample time to discuss terms of lease, was actually allowed twelve times said period. But even then he never requested any discussion. See on point: *O'Donnell v. Lebb* (Ore.), 178 P. 212, 213.

35 C.J. 1202, Sec. 521 (Op. Br. p. 46). The garage was a part of the premises, but Exhibit C fails to state the amount of rent if the garage is to be included in lease. Lessees were to have privilege of garage service for the hotel guests "on terms to be mutually agreed upon".

58 C.J. 941 is cited and quoted from (Op. Br. p. 46). The portion of the section next following that quoted by appellant reads:

> "On the other hand, it may be proper and necessary to refuse specific performance of such an agreement, as where it is incomplete and leaves terms for further negotiations and settlement."

Bennett v. Moon (Nebr.), 194 N.W. 802; 31 A.L.R. 495 (Op. Br. p. 47). The contract in that case which was very full, left no further details, as here, to be later discussed, merely provided:

> "It is agreed that a lease shall be executed covering this agreement between the parties hereto as to said building".

Plaintiff's Op. Br. p. 47 calls special attention to the A.L.R. note. In the note we find the following:

> "The term 'usual clauses' is without meaning because there are no set or standard clauses adopted by all persons who draw leases".

Buchman v. Faltis (Mich.), 150 N.W. 848, is also cited (Op. Br. p. 48) to same general point. There, it was objected the agreement for a lease was not conditioned against lessee forming a corporation with a minimum capital to take over lease and thus avoid personal responsibility.

Cochrane v. Justice Mng. Co. (Colo.), 26 P. 780, cited (Op. Br. p. 48). This involved a mining lease. Objection was made that the agreement, which was otherwise complete, contained a clause "settlement as usual", and it was contended this made the agreement too uncertain for specific performance. The court found that there had been a prior lease on the same property, to which the clause might properly refer, and also such clause might refer to a custom. The agreement involved had no clause regarding lease containing other or further provisions, provided the parties could mutually agree, etc. There were two dissents and one dissenting opinion.

Levin v. Saroff (Cal.), 201 P. 961, is cited and quoted from (Op. Br. p. 50). The agreement there was as long or longer than the ordinary lease and contemplated a lease for only 5 years at a monthly rental of $250.00. A point differentiating that case from the instant case is that there the agreement had been acted upon by lessee taking possession. The same court in a later case distinguished on this very point. (*Cappelmann v. Young* (Cal.), 165 P. (2d) 950-953; also *Store Properties v. Neal* (Cal.), 164 P. (2d) 38, 41). The contract was objected to as being too uncertain because it did not name city and state where property was located. The taking possession by lessee was held to cure any uncertainty as to location. Nor did that case involve any condition about the parties later signing a lease provided the terms could be mutually agreed upon.

Temple Enterprises v. Combs (Ore.), 100 P. (2d) 613; 128 A.L.R. 856, is cited (Op. Br. p. 51). The action involved 3 separate agreements, signed, etc. for lease of a theatre property. Taken together, and as recited in the Opinion, they contained all essentials of the lease, the court adding that other provisions contained were of the standard type and ordinarily found in leases of this character and need not be mentioned. There was no clause providing (as in the case at bar) for a subsequent lease or agreement providing the parties were able to agree on the terms. The only claim was that by oral agreement certain terms were left open for future arrangement, but the court held such matter was unavailable under the Oregon statute of frauds.

United States v. City of New York (C.C.A. 8th), 131 F. (2d) 909, is cited (Op. Br. p. 51). This involved an agreement for sale of an old post office building and federal court house, which agreement involved about $3,000,000.00 and was evidenced by correspondence between the Mayor and the Secretary of the Treasury (set out in the Opinion of the District Judge, 45 F. Supp. 229), and which was held to constitute a "contract". The question of who should bear cost of demolition was not agreed upon, but the court passed it over as a "minor detail". It does not appear what the item amounted to, but from other objections seemingly utterly trivial in a $3,000,000.00 contract the amount must have been deemed so insignificant as to be *de minimis,* etc. In any event the contract purported on its face to be complete and

final, not a "preliminary agreement", nor providing for a future agreement to be made providing the parties could agree upon the terms.

At pages 52 and 53 Op. Br., it is sought to invoke the principle that contracts for lease will be enforced almost as a matter of course. We say such principle presupposes a final, valid and binding contract for a lease.

At pages 54 and 55 of Op. Br., it is argued that damages would not be recoverable in the instant case because too speculative, etc. We answer this the same as next above.

Plaintiff takes issue (Op. Br. p. 59) with the trial court's Finding (R. p. 59) that by decreeing specific performance

> "the court would be compelling antagonistic parties (plaintiff and Charles W. Mapes, Jr.) to perform a partnership or a relation in the nature of a partnership in the control and management of a large hotel".

The evidence shows a rather intense degree of hostility as between plaintiff and his potential partner. The case as to this point is clearly within the rule of *Hyer v. Richmond Lumber Co.,* 168 U.S. 471; 42 L. ed. 547 (cited by the trial court). The case of *Roehm v. Horst et al.* (C.C.A. 3rd), 91 F. 345; affd. 44 L. ed. 953, did not involve "antagonistic parties".

Rothwell v. Vaughn (Cal.), 193 P. 611, and *Dew v. Pearson* (Wash.), 132 P. 412 (Op. Br. p. 61) appear to involve only rights of a surviving partner

after dissolution of firm and nothing as to specific performance where decree would in effect compel "antagonistic parties" to form a relation for management of a business.

Dondero v. Turrillas, 59 Nev. 394, 94 P. (2d) 276 (Op. Br. p. 63), as pertinently observed by the trial court (R. p. 63) did not involve a contract in which, as here, there was a definite provision that further negotiations were to be had. The attitude of the Nevada Supreme Court is expressed:

> "There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain or indefinite". (*Dodge Bros. v. Williams Estate Co.,* 52 Nev. 364, 287 P. 282, 283-284.)

THE SEPTEMBER 24, 1945 DOCUMENT NEVER BECAME A CONTRACT ENFORCEABLE EITHER IN EQUITY OR AT LAW, IN THAT IT AFFIRMATIVELY APPEARS THE MINDS OF THE PARTIES NEVER MET UPON TERMS, CONDITIONS OR DETAILS OF FINAL LEASE.

For convenience we excerpt portions of the Exhibit C document which we believe brings said Ex. C within the rule stated in the caption.

> "* * * plans and specifications must be approved in writing by the parties hereto before any lease on said premises shall become effective (R. p. 909) * * * Whereas it is contemplated the first party shall grant a lease (for 20 years) to the second parties. * * * The parties hereto (R. p. 910) shall immediately enter into a discussion with each other as to the terms, conditions and

details of said lease. * * * The parties hereto agree that when such terms, conditions and details have been mutually agreed upon they shall immediately thereupon enter into a written lease * * * provided that the terms, conditions and details of said lease can be mutually agreed upon between the parties hereto within 10 days after * * * actual construction has been commenced. * * * The said lease shall provide (R. p. 911) among other things (that lessees shall furnish equipment, etc.) * * * If the lease is to include the garage, then the second parties shall pay monthly 10% of the gross garage receipts, or if the first party leases the garage to a third person, the second parties are to have the privilege of garage service for their guests on terms to be mutually agreed upon. * * * The second parties (R. p. 912) as a part of said lease, will guarantee to said first party that the total annual income from the entire building which the first party will receive will be in an amount at least sufficient to cover payments required of the first party for taxes, upkeep, insurance, interest on borrowed money, and to amortize the cost of said building within the lease period.

The said lease (R. p. 913) shall contain all necessary provisions to fully effectuate the intent and purposes of the parties hereto as stated in this preliminary agreement and also to definitely set forth all usual or necessary conditions to the end that the rights and interests of each party shall be properly conserved and protected."

The case infra, decided January 7, 1947, is the most recent case we can find on the subject and we

believe it to be squarely in point with the case at bar. It involved an alleged contract very similar to Ex. C in instant case, which contained a clause:

> "It is understood that this is a temporary agreement further details to be included in a more particular agreement to be later drawn up and signed."

There, as here, the trial court found the document did not constitute a "completed contract"; that it was merely

> "an expression of a desire and a preliminary agreement to enter into a later contract".

On appeal in affirming, the court said (p. 995):

> "It is obvious from the very terms of the paper upon which the appellants rely that the purported contract was incomplete for it says * * * 'a more particular agreement to be later drawn up between the parties' ".
>
> *Reed v. Montgomery* (Ore.), 175 P. (2d) 986, 994-995-996-997, reviewing authorities.

An agreement that parties will in the future make such contract as they may then agree upon amounts to nothing, and cannot be made the basis of a cause of action, even for damages.

> *Dillingham v. Dahlgren* (Cal.), 198 P. 832, 834.

See also:

> *Union Oil Co. v. Union Sugar Co.* (Cal.), 173 P. (2d) 700, 708.

In the case infra which involved an agreement to lease, action was for damages for alleged breach of executory agreement to enter into the lease. In construing and analyzing the preliminary agreement before it, the court said, *inter alia:*

> "It may be conceded that an agreement to enter into a lease will neither be enforced in equity nor at law *if it appears from the face of the agreement that any of the terms of the lease, no matter how unimportant they may seem to be, are left open to be settled by future conferences between the lessor and lessee.* In such cases there is no complete agreement; the minds of the parties have not fully met; and, until they have, no court will undertake to give effect to those stipulations that have been settled, or to make an agreement for the parties respecting those matters that have been left unsettled." (Citing cases.) (Emphasis supplied.)
>
> *Scholtz v. Northwestern etc. Ins. Co.* (C.C.A. 8th), 100 F. 573, 574.

Cited and approved per supra in:

Thomas J. Baird Inv. Co. v. Harris (C.C.A. 8th), 209 F. 291.

See also: per Hawley, Jr.:

Snow v. Nelson (C. C. Nev.), 113 F. 353, 354.

The writing signed by both parties in the case infra, provided for the construction of a building and apparently covered at least the essentials, but there was a concluding clause reading as follows: "Formal contract to follow".

One of the parties later refused to proceed and action was commenced by the other. The trial court decided that a cause of action existed, but on appeal this was reversed, the Supreme Court, *inter alia*, saying:

> "No formal contract was ever forwarded for execution by Dunnavant and none in fact was entered into, and thereafter the appellant prosecuted the work described in the writing through other parties. * * * The cause was tried in the court below by the judge sitting without a jury, and resulted in a judgment in favor of the respondent for the full amount claimed namely $1700.00. * * * The principal question suggested by the record is whether the writing contained the bid of Dunnavant and the acceptance thereof by the appellant constituted the completed contract between the parties, *or was it an agreement settling some of the terms of the contract to be entered into later.* The face of the writing, it is at once apparent, indicates that it was intended as the latter, rather than the former. After specifying certain particulars, it expressly provides that the *formal contract is to follow.* If the writing itself was intended as the completed contract, there would have been no need for the proviso. A contract complete in itself does not need the sanction of another contract. * * * The writing, in whatever aspect it is viewed, therefore, seems to us to point to the conclusion that it was not intended to be the final agreement between the parties. * * * Both parties were men of ability and experience, and it would hardly seem that if they intended this writing to be a complete contract between them they would solemnly provide, both in writing

and orally, for a further agreement." (Emphasis supplied.)

Stanton v. Dennis (Wash.), 116 P. 650, 651.

See also:

Grow v. Davis (Kan.), 203 P. 683, 684;

St. Louis etc. Co. v. Gorman (Kan.), 100 P. 647, 649;

Mercantile Tr. Co. v. Sunset Road Oil Co. (Cal.), 168 P. 1033, 1041;

13 *C. J.*, 289, Sec. 100 & N. 12 citing long list of cases including: *Morrill v. Tehama etc. Co.*, 10 Nev. 125;

Holtz v. Olds (Ore), 164 P. 583, 587, rehearing denied: Id. P. 1184;

Toms v. Hellman (Cal.), 1 P. (2d) 31, 33-35.

Action for damages on a shipping contract which was in some respects incomplete and looked to a future contract. In discussing the subject the court, quoting said:

"A contract between two persons, upon a valid consideration, that they will at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and upon a breach thereof, the party having the election or option may recover in damages what such particular contract to be entered into would have been worth to him, if made. But an agreement that they will in the future make such contract *as they may then agree upon amounts to nothing.* An agreement *to enter into negotiations,* and *agree upon the terms of a contract, if they can,* cannot be made the basis of a cause of action. There will

be no way by which the court could examine what sort of a contract the negotiations would result in, no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. * * * Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties, but *where the preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.*" (Citing: *Shepard v. Carpenter* (Minn.), 55 N. W. 905.) (Emphasis supplied.)

St. Louis etc. Co. v. Gorman (Kan.), 100 P. 647, 649, 28 L.R.A., N. S. 637.

See also:

Beall v. Foster (Ore.), 186 P. 554, 555.

Memorandum of agreement to lease stores, describing same, for five years beginning January 1, 1911, $250.00 for the first two years and $275.00 for the following years. Usual clauses in lease to rebuilding, —was held not to satisfy the statute of frauds, C. C., Section 1624, though assuming that the figures $250.00 and $275.00 meant monthly, because the phrase "usual clauses in lease to rebuilding" were so uncertain in the absence of proof of any usual or customary clauses in the lease with respect to rebuilding; that

an action would not lie to enforce performance of the contract, nor for damages for its breach.

Wineburgh v. Gay (Cal.), 150 P. 1003, 1004.

See also:

Palmer v. Porkany (Mich.), 186 N. W. 505, 31 A.L.R. 506—Note;

Kerr etc. Corp. v. Eliz. Arden etc. (Cal.), 141 P. (2d) 938, 939;

Van Hoosen v. Briscoe (Cal.), 259 P. 1115, 1116;

Duffield & Co. v. Ellsworth, 255 N.Y.S. 716;

Evans v. Marr, (C.C.A. 5th), 298 F. 288, 290;

Hackley v. Oakford (C.C.A. 3rd), 98 F. 781, cert. denied, 44 L. ed. 945;

Linnard v. Sonnenschein (Cal.), 272 P. 315, 318—citing, *Morrill v. Tehama etc. Co.,* 10 Nev. 125;

Elliot on Contracts, Vol. 1, Sec. 175;

Long v. Needham (Mont), 96 P. 731;

Monahan v. Allen (Mont.), 130 P. 768, 771;

Kofoed v. Bray (Mont.), 220 P. 532;

122 *A.L.R.* 1256—Note;

Shepard v. Carpenter (Minn.), 55 N. W. 906;

Segner v. Guaranty etc. Co. (Iowa), 189 N. W. 745;

An agreement to purchase land "subject to a proper contract" to be prepared by the vendor's solicitors was conditional upon the execution of the proper contract, and that no binding agreement resulted, notwithstanding the vendor's solicitors prepared proper contract, which was signed by the vendor, but was

not signed by the purchaser, although his solicitors approved it. See:

122 *A.L.R.* 1271 and N. 94.

See also:

122 *A.L.R.* 1272 and N. 99.

Memorandum for lease reciting that defendants agreed to lease an hotel to a third person, but that it contained only principal points of their understanding, and that lease should contain the "usual covenants", does not create either in law or equity any enforceable right for or against either party.

Woods v. Mathews (Mass.), 113 N. E. 201, 31 A.L.R. 507—Note.

If the parties understand at the time of the preliminary agreement that a written contract shall be entered into embodying the terms proposed and such other terms as may be deemed necessary, the execution of the written agreement is essential to a valid contract. Th case involved a preliminary contract embracing certain stated terms with the clause "and such further conditions as may be deemed necessary". And it was held that an enforceable contract was not shown.

Eads v. Carondelet, 42 Mo. 113.

See also:

Mortenson v. Cruikshank (Wash.), 101 P. (2d) 604, 605;

Esselstyn v. Meyer etc. Bank (Mont.), 208 P. 910, 913;

Western Roofing etc. Co. v. Jones (Okla.), 109 P. 225, 226.

In the case infra, the preliminary agreement for sale of real estate contained a clause

> "A formal agreement shall be entered into, pending actual transfer"

and it was held that if the formal agreement was to contain anything more than mere detail, the preliminary agreement could not be specifically enforced.

Northwestern etc. Co. v. Grays Harbor etc. Co. (C.C.A. 9th), 221 F. 807, 813.

To the effect such contract was void, see:

K V I v. Doernbecker (Wash.), 167 P. (2d) 1002, 1014;

Scholtz v. Northwestern etc. Co. (C.C.A. 8th), 100 F. 573, 574;

Store Properties v. Neal (Cal.), 164 P. (2d) 38, 40;

122 *A.L.R.* 1262—Note;

St. Louis etc. R. Co. v. Gorman (Kan.), 100 P. 647, 649;

122 *A.L.R.* 1258—Note;

Elliot on Contracts, Vol. 1, Sec. 175;

30 *A.L.R.* 573;

Brothers v. Arave (Ida.), 174 P. (2d) 202, 205-206—recent and important case;

Arnot v. Alexander (Mo.), 100 A. D. 252, 31 A.L.R. 510;

Cohen v. New England etc. Co. (C.C.A. 7th), 140 F. (2d) 1, 2, cert. denied, 88 L. ed. 1576;

25 *R.C.L.* 218, Sec. 17, citing long list of authorities;

Nolan v. Grimm (Ida.), 173 P. (2d) 74—important case;

St. Paul etc. Co. v. Fox (Wash.), 173 P. (2d) 194, 196—important case;

Union Oil Co. v. Union Sugar Co. (Cal.), 173 P. (2d) 700, 708—important case;

Nuttall v. Holman (Utah), 173 P. (2d) 1015, 1019—important case;

LaCompagna etc. v. Spanish etc. Co., 146 U. S. 483, 36 L. ed. 1054;

Karlock v. Johnson (Wis.), 160 N. W. 1053, 1054;

Williston, Contr. (Rev. Ed.), Vol. 1, Sec. 37, p. 99;

Weed v. Lindsay and Morgan (Ga.), 20 L.R.A. 33, 39—important case;

Huston v. Harrington (Wash.), 107 P. 874;

Veepe v. Hanson (N. D.), 169 N. W. 31;

Ecton v. Lexington Ry. Co. (Ky.), 59 S. W. 864;

McDonnell v. Coeur D'Alene Lbr. Co. (Wash.), 106 P. 135, 137.

The so-called guaranteed minimum (Par. 9, R. p. 912), is too uncertain to be specifically enforced.

See:

Pray v. Clack (Mass.), 31 A.L.R. 511—Note.

THE SEPTEMBER 24, 1945 DOCUMENT EXPRESSLY PROVIDES THAT A FORMAL WRITTEN LEASE SHOULD BE LATER ENTERED INTO—"PROVIDED THAT THE TERMS, CONDITIONS AND DETAILS OF SAID LEASE CAN BE MUTUALLY AGREED UPON * * *"

We excerpt:

> "The parties hereto shall immediately enter into a discussion with each other as to the terms, conditions and details of said lease. * * * The parties hereto agree that when such terms, conditions and details have been mutually agreed upon they shall immediately thereupon enter into a written lease with each other for all of said structure when completed, * * * provided, that the terms, conditions and details of said lease can be mutually agreed upon between the parties hereto within 10 days after the written contract for the construction of said structure has been entered into by the first party (Mrs. Mapes) and within 10 days after the actual construction has been commenced."

Obviously, the parties contemplated "terms" and "conditions" to be set up in the lease not set up or foreshadowed by the September 24th document,—else why the proviso?

The parties further contemplated that the "discussion" would or might develop terms or conditions not embraced within scope of the September 24th document, because they provide that they shall enter into a written lease provided the terms, conditions and details of said lease can be mutually agreed upon.

If the parties cannot "mutually" agree, then the inevitable conclusion is that there would be no lease,

nor could any court compel a lease because the parties had by the clause supra, reserved the right to disagree, as well as agree. We submit the following authorities in support:

The case infra, is very closely in point. In that case there was an agreement of the plaintiff to rent a building upon the demised premises to be rented in part by the defendant, and the lease provided that the lessor should proceed to construct a building upon the property and thereafter prosecute erection of same until completed; "that said building shall be constructed generally in accordance with the preliminary leasing plans and outline specifications therefor which are attached hereto, approved in writing by both the lessor and the lessee, and by reference made a part herewith the same as if set forth herein, and the final plans and specifications hereinafter referred to. The final plans and specifications shall be prepared by the lessor within a reasonable period of time, and shall be approved in writing by both the lessor and the lessee before the commencement of construction of said building, and upon said final plans and specifications being approved by the parties hereto as aforesaid, they shall become a part of this lease by reference to same as if set forth in full herein, and neither party to this lease shall unreasonably withhold its approval thereof."

The complaint alleged that plaintiff prepared the final plans and specifications, but defendant unreasonably failed to approve same and the building was not erected, to the damage of plaintiff. Demurrer to the

complaint was sustained without leave to amend, and the plaintiff appealed. In affirming, the District Court of Appeal, in the course of its opinion, said:

> "Defendant maintained that the lease is merely an agreement to make an agreement, and therefor, is not binding upon the defendant in any way, either in an action upon the agreement itself or for damages for its breach. This for the reason that the final plans and specifications for the erection of a building to be prepared by the lessor and approved by the lessee was not approved."

The court then considered whether that part of the clause relative to erecting the building and where the parties agreed to prepare and approve final plans and specifications left a material condition to be left for future agreement and concluded that it was apparent that approval of the final plans and specifications was essential prerequisite to a binding contract between the parties. Upon its face additional terms were to be agreed upon before they were to be bound by it.

> *Kerr Glass etc. Corp. v. Elizabeth Arden Sales Corp.* (Cal.), 141 P. (2d) 938, 939.

See also:

> *K V I v. Doernbecker* (Wash.), 167 P. (2d) 1002.

In the case infra, a lengthy preliminary agreement contained all of the essentials of a lease and was entered into and agreed to by both parties, and it provided that a lease was to be entered into upon the terms stated in the preliminary agreement.

On refusal of the owner to conclude the agreement or to sign up a lease for 99 years as contemplated, suit for specific performance was brought, and the court held that under the rule that an agreement could not be specifically enforced if its terms are not sufficiently certain to make the precise act which is to be done clearly ascertainable; under the rule that equity will not specifically enforce that which is only the basis for an agreement; under the rule that if the things mentioned in the agreement are the subject of future ascertainment, the agreement is not final but indefinite and cannot be specifically enforced in equity, and where the contract appears to be a preliminary agreement embodying only the spirit of a contemplated supplementary contract, showing that the minds of the parties never met upon the details, the contract is not specifically enforceable, the plaintiff was not entitled to specific performance.

Store Properties v. Neal (Cal.), 164 P. (2d) 38.

In the case supra, there is an unusually clear analysis of the authorities. It was there held that where it was understood that the terms of the contract were to be reduced to writing and signed by the parties, the preliminary agreement could not be deemed to become a completed contract until assent of its terms was evidenced by a writing subscribed by all the parties.

See also:

Daytona etc. Co. v. Glen Flora Co. (Ill.), 178 N. E. 107.

The case infra, involved suit for specific performance of an earnest money receipt or agreement re-

sulting from operation of hotel property described in the receipt. The so-called earnest money receipt contained a provision for the making of a lease and a chattel mortgage later on and the defendant agreed that she would execute the same. $500.00 was paid down by the plaintiff. The preliminary agreement contained nothing in regard to what should happen in case of total destruction of the premises, etc. and this was referred to by the court as one reason why specific performance of a lease including any such provision would not be allowed. The same with abatement of rent, if there was a partial destruction; the same as to lessor being obligated to repair or replace roof when notified of any necessity therefor. The same in regard to damage to the property resulting from failure to maintain the roof or exterior of the building by lessor. The court stressed the fact that the receipt by its language contemplated that additional papers, namely, a lease, etc., would have to be prepared and executed before the deal could be closed. The receipt provided that upon completion of "proper" bill of sale, the defendant agreed she would execute same, etc., and the court concluding that the word "proper" left the matter ambiguous, asked what would be a proper lease. The court said a proper lease could not mean a lease in accordance with the terms and conditions of the receipt for if that had been the intent of the parties they would have so stated, as was done in the case of *Omak Realty etc. Co. v. Dewey* (Wash.), 225 P. 236.

The court also referred to the fact that no time was fixed when the proposed lease should begin to

run, except that when a proper bill of sale, chattel mortgage and lease should have been prepared, respondent agreed to execute them and surrender possession.

Then the court concluded that it was not intended by the parties to restrict the conditions of the lease to those contained in the receipt; that to specifically enforce the earnest money receipt the court would first have to determine what terms and conditions should be included in a proper lease. That to do this would be writing a lease, the terms and conditions of which were not covered by the earnest money receipt and upon which the minds of the parties had never met. This a court of equity will not do, and said:

> "An agreement to enter into a lease should not be enforced if any of the terms of the lease are left open to future settlement." (Citing cases.)
>
> *Keys v. Klitten* (Wash.), 151 P. (2d) 989, 992-993, 996-997.

To the same effect, see:

> *Patch v. Anderson* (Cal.), 151 P. (2d), 644, 646.

The case infra, is in point. There, a memorandum of an agreement was made between the parties, containing practically all of the details for the main contract, but it also contained the following clause:

> "And a formal agreement shall be entered into pending actual transfers".

The court held that this indicated that the parties intended that there would be a regular or formal agreement drawn later on and that they did not in-

tend to be bound by the preliminary agreement which was in the form of a letter and accepted by the other party.

Northwestern Lbr. Co. v. Grays etc. Co. (C.C.A. 9th), 221 F. 807.

The opinion is lengthy and a number of cases are cited.

See also:

Durst v. Jolly (Cal.), 160 P. 449, 451.

See also:

Stanton v. Dennis (Cal), 116 P. 650, 651;
1 *Restatement Law Contracts,* 33, Sec. 26;
Boysseau v. Fuller (Va.), 30 S.E. 457.

See also:

13 *C.J.,* 289, Sec. 100 & N. citing long list of cases, including: *Morrill v. Tehama etc. Co.,* 10 Nev. 125.

"If the contracting parties manifest an intention of executing, subsequently, a formal lease with covenants, the agreement to lease is not a completed lease."

Dan Cohen Realty Co. v. Natl. S. & T. Co. (C.C.A. 6th), 125 F. (2d) 288, 289, citing:
Elliot on Contracts, Vol. 5, Sec. 4550;
Alexander v. Alexander (Ore.), 58 P. (2d) 1265, 1266-1267.

A contract specified the manner of payment and the rate of interest and the time when the interest was to be paid, but it provided in conclusion that a contract was to be drawn up and signed within the

next few days. The court held that inasmuch as the memorandum did not disclose what all of the terms of the formal agreement were to be, nor specify whether or not the formal agreement was to contain provisions for default of payment of interest and taxes, specific performance was denied.

Venino v. Nœgele (N.J.), 131 A. 895, Aff. 134 A. 920.

See also:

Carson v. Redding (Colo.), 120 P. 147, 148;

58 *C. J.* 943, Sec. 116;

Pomeroy Spec. Per., 3rd ed., p. 380, Sec. 148, p. 394, Sec. 154.

Specific performance of an agreement to execute a lease, in which some details were to be later agreed upon between the parties and put in the lease, was refused in the case infra.

McKnight v. Broadway etc. Co. (Ky.), 145 S.W. 377.

In the case infra the written contract of sale left the price to be subsequently fixed by agreement of the parties, and it was held that this was not sufficient within the statute of frauds, the court saying:

"The price was still a matter yet to be determined by agreement. No meeting of the minds of the parties had yet occurred on the question of price, but the question of price was wholly reserved for future agreement. It was not left to be determined by a third party, or by the market rates, or in any manner other than by future agreement of the parties. Until such an agree-

ment has been reached and reduced to writing, no sufficient written contract can be said to have been executed to take the case out of the statute of frauds."

Booth v. A. Levy & J. Zentner Co. (Cal.) 131 P., 1062, 1063.

"And there are numerous cases supporting the rule that where the terms of a contract, or the conditions under which it is to become effective, are not fully and definitely settled in the previous negotiations, and a written or more formal contract embodying the completed contract is contemplated, no valid and enforceable contract exists until the execution of the written or more formal instrument."

122 *A. L. R.*, 1252. Note citing exhaustive list of cases.

See also:

58 *C. J.*, 941, Sec. 107 and N. 18-20;

Beck v. Cagle (Cal.) 115 P. (2d) 613.

An action was brought for breach of alleged contract to convey an apartment hotel and the memorandum relied upon as a contract contained a clause that the plans and specifications were to be approved; that plaintiff did not approve; that according to the written instructions, both parties reserved the right to approve letters with reference to plans and specifications and neither of the parties ever did approve. On the trial, it was contended that the document did not contain all the terms and conditions it should have contained to conform to the original oral agreement;

that there was no writing signed by the parties approving any plans and specifications for improvements, but on the trial the court commented on the fact that no proof was offered that the proposed supplemental instructions of defendants with regard to the plans and specifications were ever approved by the plaintiff. The trial court sustained a demurrer. On appeal this judgment was affirmed, the appellate court stating, *inter alia:*

> "It was not the duty of the trial judge to insert what had been omitted, but merely to ascertain and declare the legal effect of the contents of the writings filed by Ajax in the vain hope of completing the escrow. * * * Appellant readily understood * * * that they (instructions) must be approved by defendants by filing their written approval in the escrow".
>
> *Ajax Holding Co. v. Heinsbergen* (Cal.) 149 P. (2d), 189, 191-192.

See also:

Evans v. Marr (C.C.A. 5th) 298 F., 288, 290,

In the case infra the preliminary agreement specifically provided for a lease to be executed according to a certain form known as Form No. 88, but which as set out in the contract there were left a number of blanks and it was provided that there was to be a subsequent contract. The court found that the lease could not be written without further negotiations respecting its terms and hence the contract was not binding.

Grow v. Davis (Kans.) 203 P., 683, 684-685.

See also:

Livingston etc. Works v. City of Livingston (Mont.) 162 P., 381;

1917D *L. R. A.,* 1074, 1078, 1079.

The agreement in the instant case calls for the erection by the first party of a hotel building according to plans and specifications to be agreed upon in writing between the first party and the second parties. In the case infra it was held that an agreement to lease a building if certain alterations are made upon plans to be agreed upon, imposed no obligations upon the owner to execute the lease if no plans are agreed upon.

Mayer v. McCreery (N. Y.) 23 N. E., 1045;

L. R. A., 1917D. Note p. 1080.

The case infra, involving agreement to give a lease, which contained specific provisions as to what the lease when drawn should provide for and what the parties had agreed to, etc., and among other things was a clause that provided that the landlord should approve plans and specifications for alterations and because of this clause the agreement was held not capable of specific performance. The court said that the plans and specifications had not been prepared; that when they were prepared it was manifest they should be prepared by and to the satisfaction of the proposed lessor; that by the clear language of the written instrument involved, they were also to be approved by Mr. Burrow, the proposed lessee. The court said:

"There was therefore a material element in the writing on which the minds of the parties had not met."

Howard v. Burrow (Cal.) 245 P., 808, 810.

See also:

Daytona Gables etc. Co. v. Glen Flora etc. Co. (Ill.) 178 N. E., 107, 117;

DeRemer v. Anderson, 41 Nev. 287, 169 P. 737, 738-739;

Spinney v. Downing (Cal.) 41 P., 797, 798;

L. R. A., 1917D, Note p. 1980.

"When it is shown that the parties intend to reduce a contract to writing, this circumstance creates a presumption that no final contract had been entered into, which can only be overcome by strong evidence. * * * The circumstance that the parties do intend that a written contract or memorandum of their agreement should be prepared and signed is strong evidence to show that they did not intend the previous negotiations to amount to an agreement."

Atlantic etc. Co. v. Robertson (Va.) 116 S. E. 476.

See also:

Mississippi etc. Co. v. Swift (Me.) 41 A.S.R. 545, 555.

"But it is not enough that the main features of the contract have been fixed by mail. If material terms, though subsidiary in their nature, have yet to be agreed upon, something in that case remains to be done besides the mere formal act of writing

out and signing the agreement. There has been no meeting of minds and no contract."

122 *A.L.R.* 1258, note.

See also:

Esselstyn v. Meyer etc. Bank (Mont.) 208 P. 910, 913;

Beall v. Foster (Ore.) 186 P. 554, 555;

Cooperative Assn. v. Phillips, 56 Cal. 539, 547-548.

"It is generally held that, where the parties by their memorandum or series of letters indicates that another contract is to be entered into which will embody the precise terms on which they have agreed, or as to which they will agree, the contract is not sufficiently complete or certain to form the basis of an action for specific performance."

Reeves v. Littlefield (Mont.) 54 P. (2d) 879, 881.

See also:

Dillingham v. Dahlgren (Cal.) 198 P. 832, 834.

"If the so-called contract leaves certain terms open for future negotiations between the parties it is evidently incomplete, and neither party can be compelled, in such future negotiations, to accept the offer of the adversary party. Specific performance is, accordingly, refused in cases of this sort."

6 *Page on Contracts,* 2d ed., p. 5783, Sec. 8281.

In the case infra the parties left some of the terms of agreement to be settled at a subsequent meeting,

but the subsequent meeting never took place, and it was held there was no meeting of the minds with respect to the matters to be taken up at such subsequent meeting, which included the subject of feeding of hogs and trucks and for hauling equipment.

Place v. Parker (Mo.) 180 S. W. (2d) 538.

> "If anything is left open for future consideration, the informal paper cannot form the basis of an agreement, where it is contemplated by the parties that there shall be a formal agreement prepared."
>
> 122 *A. L. R.* 1255, note.

An agreement provided that a lease should not be binding if plans and specifications were not signed by landlord, tenant and mortgagee, and the condition was not complied with, subsequent oral agreement that submitted plans substantially carried out the contract, landlord's approval of plans and specifications, and landlord's agreement to go ahead with improvements, did not constitute a complete "contract" which could be made basis of right to tenant's action for specific performance since resort to the lease was essential to ascertain obligations of the parties.

Crawford Clothes v. 65 Bank Street Co. (Conn.) 30 A. (2d) 914.

In the case infra, involving a covenant for renewal of a lease, it was provided that the rent should be stipulated according to the value of the property. Specific performance was sought but the court held that there was a want of any certain basis for the ascertainment of the rent to be paid. The court said:

"But who is to fix the value of the property?" and continued:

"Certainly each party would have the right to do it for himself, in the absence of any other stipulation. I know of no rule of law which can compel a party to change his estimate of the value of his property, when by contract he has the right to determine it for himself."

The court concluded that there was no test by which certainty could be attained, and reversed a judgment decreeing specific performance.

Morrison v. Rossignol, 5 Cal. 64, 65-66.

The case infra involved a contract for the purchase of a tract of land in Fallon, Nevada, of which contract specific performance was prayed. Decree went for the plaintiff and on appeal it was urged on behalf of the appellant that the contract was too uncertain to be enforced. In affirming the decree the court, on this point, said:

"Is the agreement in question so ambiguous as to render it incapable of enforcement? There is no better established principle of equity jurisprudence than that specific performance will not be decreed when the contract is incomplete, uncertain or indefinite" (citing authorities).

Dodge Bros., Inc. v. Williams Est. Co., 52 Nev. 364, 287 P. 282, 283, 284.

See also:

Conas v. Sullivan (Mass.) 145 N. E. 529, 530;

H. M. Weill Co. v. Creveling (App. Div.) 168 N.Y.S. 385, 386.

The case infra is closely in point. The court held that a memorandum agreement for sale of land which fixed the purchase price and the date of transfer, but provided that the sum to be paid on signing the contract on fixed date was to be agreed upon, was incomplete and unenforceable where parties did not reach the contemplated agreement, and held further that when any material element of a contemplated contract is left to negotiations, there is no enforceable contract irrespective of the statute of frauds.

Ansorge v. Kane (Ct. of App., N. Y.) 155 N. E. 683, 684-685.

An agreement, termed an "application" and referred to in the court's opinion as a "preliminary agreement" between owner and proposed lessee provided *inter alia* that

> "apartment to be redecorated throughout to tenant's selection. Selection of colors will be made after lease is signed".

The court held said clause made the paper too uncertain to constitute a contract and we excerpt from the opinion:

> "There is nothing in the application to justify a conclusion there was a union of the minds of the parties as to the terms of the lease. * * * Whether the * * * rental was to be paid in advance or at the end of the term, or in quarterly or monthly installments, * * * does not appear. The matter of decoration and selection of colors was also incompletely referred to. * * * It left the character and extent of the decoration undefined and it cannot be determined to a certainty * * *

whether the decoration was to be paid for by the landlord or by the tenant. * * * 'Selection of colors will be made after lease is signed,' clearly indicates that a lease was to be signed. * * * Nothing was stipulated as to how or when the rent should be paid. Nothing was said as to how long a period of grace for non-payment of rent would be allowed, or as to whether the landlord expected the proposed tenant to agree to confess judgment for the rent payable for the entire term in case of default and to waive exemptions in that confession of judgment, or as to how the landlord should acquire possession of the premises in case of default, or as to whether the lease would be automatically renewed at the end of the term. No reference was made to light, heat, and water, or to the respective rights and obligations of the parties should the apartment be destroyed or damaged by fire. It is not unusual for persons to agree to negotiate with the view of entering into contractual relations and to reach an accord *at once* as to certain major items of the proposed contract and then later find that on other details they cannot agree. In such a case no contract results. (Emphasis by the court.) * * * In the instant case the conclusion is inescapable that the 'application for lease' was a mere offer by the applicant of himself as a possible tenant * * * if * * * he and the latter's representative would meet and execute a lease *provided they could both agree on all the necessary stipulations, in addition to the two stipulations* (term and aggregate rental) as to which there was preliminary accord." (Emphasis supplied.)

Upsal Street R. Co. v. Rubin (Pa.) 192 A. 481, 483, 484.

THE SEPETEMBER 24, 1945 DOCUMENT PROVIDES: "THAT SAID LEASE SHALL PROVIDE * * * THE SECOND PARTIES (MAPES, JR. AND DENSON) WILL AT THEIR OWN COST, NOW ESTIMATED AT $150,000.00 PROVIDE AND PLACE IN SAID STRUCTURE SUCH FURNITURE, FIXTURES AND EQUIPMENT AS SHALL BE SUITABLE, PROPER AND NECESSARY TO FURNISH AND EQUIP THE SAME AS A FIRST CLASS HOTEL AND APARTMENT BUILDING."

Who is to determine terms or conditions as to what is "suitable" or "proper" or "necessary"? That said clause creates such an uncertainty as to preclude specific performance, we say is established law. The authorities cited by us herein as to uncertainty as to the other phases are equally applicable here. Below are cited a few additional.

Woods v. Mathews (Mass.) 113 N. E. 201, 31 A.L.R. 507.

"Mutually agreeable" as to future contract makes it uncertain.

American etc. Co. v. Letton (C.C.A. 2d), 9 F. (2d) 799, 801.

THE DESCRIPTION IN THE SEPTEMBER 24, 1945 DOCUMENT DOES NOT SPECIFY OR INCLUDE THE BASEMENT, UNLESS THE TERM "GARAGE" IN THE FIRST PREAMBLE BE DEEMED TO REFER TO BASEMENT, AND SO WITH THE CLAUSE—"IF THE LEASE IS TO INCLUDE THE GARAGE, THEN THE SECOND PARTIES SHALL PAY MONTHLY 10% OF THE GROSS GARAGE RECEIPTS, OR, IF THE FIRST PARTY LEASES THE GARAGE TO A THIRD PERSON, THE SECOND PARTIES ARE TO HAVE THE PRIVILEGE OF GARAGE SERVICE FOR THEIR GUESTS ON TERMS TO BE MUTUALLY AGREED UPON."

We contend the uncertainty as to the garage and particularly the clause plaintiff and Mapes, Jr. were

to "have the privilege of garage service for their guests on terms to be mutually agreed upon", creates an uncertainty rendering specific performance impossible. We say also that it shows there was no agreement on that subject and hence the so-called contract never became a binding or legal contract. The authorities elsewhere cited are also applicable here, but we call attention to a few additional which seem specially in point.

Shepard v. Carpenter (Minn.), 55 N.W. 906;
49 *Am. Jur.* 45, Sec. 32 and N. 2 citing: 49 A.L.R. 1461 and note;
Gilman v. Brunton (Wash.), 161 P. 835.

EXHIBIT C IS SO UNCERTAIN AS TO THE CHATTEL MORTGAGE CLAUSE AS TO PRECLUDE SPECIFIC PERFORMANCE. THE CLAUSE READS: "THAT SAID LEASE SHALL PROVIDE THAT THE SECOND PARTIES ARE TO EXECUTE AND DELIVER TO THE FIRST PARTY A FIRST CHATTEL MORTGAGE COVERING THE FURNITURE, FIXTURES AND EQUIPMENT PLACED IN THE HOTEL AND APARTMENTS AS AFORESAID, TO SECURE THE RENTAL PAYMENTS AS PROVIDED IN SAID LEASE."

The terms of chattel mortgage are left uncertain as to what shall be at mortgagors' cost; as to provisions for insurance, keeping equipment, furniture, etc. up by replacements; interest on deferred rental payments, if any, and if so, at what rate; remedies in case of default, etc.

In said agreement nothing is said as to the chattel mortgage property being insured by the mortgagors, nor as to the rate of interest payable on the moneys

therein provided to be secured, etc. Uncertainty as to the matter of interest payable on said chattel mortgage is a ground for denying specific performance.

See:

49 *Am. Jur.* 46, Sec. 33 and N. 19 citing: 37 A.L.R. 376 note;

58 *C. J.* 938, Sec. 101 and N. 76 citing: *Burnett v. Kullak* (Cal.), 18 P. 401;

Blackmore-Danzig Co. v. Sillsbee, 225 N.Y.S. 767;

Magee v. McMannus (Cal.), 12 P. 451.

Where the contract was silent as to whether property was to be conveyed by deed with mortgage back, or by title retaining contract, or by outright conveyance without security; time of possession; remedies on purchaser's default; taxes and insurance; time of payment of interest; and place of payment, the court held that this did not justify specific performance by a prospective purchaser.

Reeves v. Littlefield (Mont.), 54 P. (2d) 879.

See also:

Manning v. Ayres (C.C.A. 7th), 77 F. 690, 696;

Schmidt v. Malavagos (Ohio), 187 N.E. 793;

Pomeroy, Spec. Per., 3rd ed. 406, Sec. 159—Notes.

In the case infra the court was construing a provision in a contract that required among other things a mortgage to be executed. The court said "For how long is the mortgage to run?" "At what rate of interest?" The court says it was left in the dark as to

the terms of the mortgage the party was to give and concluded that the agreement was too indefinite and uncertain to support a judgment for specific performance and affirmed a judgment of the lower court sustaining a demurrer.

Burnett v. Kullak (Cal.), 18 P. 401, 402.

See also:

Keys v. Klitten (Wash.), 151 P. (2d) 989, 993-997;

Upsal S.R. Co. v. Rubin (Pa.), 192 A. 481, 483, 484.

See to same point:

McKibbin v. Brown, 14 N.J. Eq. 13;

Greenleaf v. Blakeman, 56 N.Y.S. 76; modified: 58 N.Y.S. 76;

Blanchard v. Detroit etc. Co. (Mich.), 18 A.R. 142, 155;

Nolan v. Grimm (Ida.), 173 P. (2d) 74, 76—recent and important;

Louisville etc. Co. v. Bodenschatz (Ind.), 39 N.E. 703.

THE EXHIBIT C INSTRUMENT SHOWS ON ITS FACE THAT THE PARTIES DID NOT INTEND SAME TO CONSTITUTE ANY BINDING AGREEMENT FOR A LEASE BECAUSE THEY PROVIDED THAT: "THE SAID LEASE SHALL * * * DEFINITELY SET FORTH ALL USUAL OR NECESSARY CONDITIONS TO THE END THAT THE RIGHTS AND INTERESTS OF EACH PARTY SHALL BE PROPERLY CONSERVED AND PROTECTED.

Provision re "necessary conditions" would require court to determine what conditions were "necessary."

In the case infra the agreement was to give a lease "satisfactory to both of us, but based upon the earning capacity of the hotel". The court held document too uncertain and meaning nothing more than that the lessor and the lessee at some future time should agree on the terms of the lease before it should be made. The "earning capacity of the hotel" was held too indefinite.

Bevan v. Templeman (Ore.), 26 P. (2d) 775, 778.

See also:

Eads v. Carondelet, 42 Mo. 113.

In the case infra the agreement contained the following:

> "The terms and conditions pertaining to this are to be agreed upon later by us, but are to be in the bounds of reason and on about the same basis as have been customary in similar deals before by other people".

The court said this clause made the agreement so uncertain as that there was no contract at all.

Beall v. Foster (Ore.), 186 P. 554, 555.

"Allowable expenditures" make contract too indefinite to be specifically enforced.

Patch v. Anderson, (Cal.), 151 P. (2d) 644, 646.

"Usual clauses in lease to rebuilding", was included in a memorandum of agreement to lease store, but the court held that the quoted clause made the agreement so uncertain that no specific performance could be had, nor even an action for damages for the breach.

Wineburgh v. Gay (Cal.), 150 P. 103, 104.

See also:

Palmer v. Pokorny (Mich.), 186 N.W. 505; 31 A.L.R. 506—Note.

Pomeroy's Specific Performance of Contracts, 3rd ed., 402, Sec. 159 contains an elaborate discussion on the subject of certainty of contracts, in which there is a clause re "necessary", and in the notes is found the following:

> "Contract for sale of an estate, vendor reserving 'the necessary land for making a railway' through the estate to a place named, held, in action for a specific performance by the vendor, that the reservation was so uncertain, that it made the contract incapable of enforcement.
>
> Agreement for 'satisfactory security' too uncertain; agreement to lease right to remove sand 'the sand to be taken from places to be agreed on from time to time', too uncertain".

EXHIBIT C (R. pp. 911-912) PROVIDES: "IF THE LEASE IS TO INCLUDE THE GARAGE, THEN THE SECOND PARTIES SHALL PAY MONTHLY 10% OF THE GROSS GARAGE RECEIPTS, OR, IF THE FIRST PARTY LEASES THE GARAGE TO A THIRD PERSON, THE SECOND PARTIES ARE TO HAVE THE PRIVILEGE OF GARAGE SERVICE FOR THEIR GUESTS ON TERMS TO BE MUTUALLY AGREED UPON.

The document affords no test as to whether the "garage" referred to is to be a part of the proposed structure, or situated on separate premises.

Inclusion of the garage in the proposed lease apparently is optional, but if Mrs. Mapes leases the garage to a third person, Mapes and Denson shall have privilege of garage service for their guests on "terms to be mutually agreed upon". How specifically enforce such clause?

We have elsewhere cited and quoted from authorities to the point that such clause "terms to be mutually agreed upon" and similar provisions in preliminary agreements render the same void, or in any event, incapable of specific performance. In addition, we specially call attention to the following:

In the case infra, a land option contract provided that the purchaser was authorized to enter into contracts for the sale of property under such terms which may be mutually agreed upon by the parties thereto, and it was held that said terms not being definite and certain, either as to consideration to be paid or the time of payment, but left to future agreement, the contract was void.

Esselstyn v. Meyer etc. Bank (Mont.), 208 P. 910, 913.

Specific performance suit. Complaint was dismissed and plaintiff appealed. The contract sought to be enforced was for sale of land and was fairly complete, except for the last clause which read:

> "It is understood that the ultimate purchasers and the undersigned will work out the details of the apportionment of mortgages, release clauses, etc."

And it was contended by defendants that said clause made the contract unenforceable, on which point the court said:

> "The last clause of the contract provides that the Glen Flora Company and the ultimate purchasers will work out the details of the apportionment of mortgages, release clauses, etc. These are mere details to be finally agreed upon by the vendor with the purchasers. If a decree for specific performance should be rendered, how can the court decree what the Glen Flora Company must do under this provision of the contract? Though a contract in writing to convey real estate may clearly and definitely describe the property agreed to be conveyed, it cannot be specifically enforced if it does not give an absolute right to conveyance without further negotiation thereon."
>
> *Daytona Gables etc. Co. v. Glen Flora etc. Co.* (Ill.), 178 N.E. 107, 117.

The case infra appears to be very closely in point. We excerpt:

> "'Although a promise may be sufficiently definite when it contains an option given to the prom-

isor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.'"

Williston on Contracts (2d Ed.), Vol. I, Sec. 45, cited and quoted per supra:

Anderson & Brown Co. v. Anderson (C.C.A. 7th), 161 F. (2d) 974, 977; decided May 23, 1947.

WHERE AN ESSENTIAL ELEMENT IS RESERVED FOR THE FUTURE AGREEMENT OF THE PARTIES NO LEGAL OBLIGATION ARISES UNTIL SUCH FUTURE AGREEMENT.

See on point:

Williston on Contracts, Section 45;

Restatement of the Law of Contracts, Section 32;

Elkhorn-Hazard Coal Co. v. Kentucky etc. Corp. (C.C.A. 6th), 20 F. (2d) 67;

Friedman v. Bergin (Cal.), 131 P. (2d) 13.

In *Wynne v. McCarthy* (C.C.A. 10th), 97 F. (2d) 964, the contract involved, among other things, had the following clause:

"That portion of the stock which shall be considered sold and that portion which shall be considered consigned shall be designated specifically agreed upon at the time said property is removed from the cars at Wortham, Texas."

The court in stating that the contract thereby reserved an essential element for the future agreement of the parties, said:

> "Where an essential element of a contract is reserved for future agreement of the parties, no obligation arises until such future agreement is consummated." (Citing cases.)

In *Savannah Guano Co. v. Fogle* (S. C.), 100 S. E. 59, the court said:

> "Can a party be mulcted in damages for refusing to make a contract, even though he has promised to do it, when the terms of the contract have not been agreed upon? Until the terms have been agreed upon there can be no contract."

See, also:

Boatright v. Steinite Radio Corp. (C.C.A. 10th), 46 F. (2d) 385;

Woods v. Matthews (Mass.), 113 N. E. 201.

Radkinsky Administrator v. Ahlswede, 185 Ill. App. 513.

This was an action of covenant based on a sealed instrument. The instrument provided that Ahlswede, who was the owner of a certain lot situated in Chicago, would build a building on a lot, which was to cost in the neighborhood of $30,000, and to be finished on or before September 1, 1919. This building was to be erected "upon plans to be drawn by Fromann & Jebsen". The agreement was specific as to the rental and other provisions to be incorporated into the lease. The court in holding that no binding contract was entered into says:

"If an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void, for neither the court nor the jury can make an agreement for the parties. Here all that was shown to the plaintiff at or before the writing under seal was executed was a sketch of the front of the building and a ground floor plan. Neither the sketch nor the floor plan contains any sections or detailed drawings. The writing declared on states that the building is to be erected 'upon plans to be drawn by Fromann & Jebsen', and the plans were not drawn until a month or longer after the writing declared on was executed. The writing makes no reference to specifications. We do not think that it can be ascertained with any reasonable certainty from the writing taken in connection with the sketch and floor plan shown to the plaintiff before the writing was executed, the kind of a building the parties agreed should be built, and that this is an uncertainty which must prevent a recovery by the plaintiff."

American Merchant Marine Ins. Co. v. Letton (C.C.A. 2nd), 9 Fed. (2d) 799, cert. denied 271 U. S. 668.

The court says:

"If the terms are left open to be settled in the future at conferences or negotiations between the parties, the minds of the parties have not fully met, and, until they have, no court may undertake to give effect to those stipulations that have been settled or to make an agreement for the parties respecting those matters that have been left unsettled."

In addition to the above decisions the following are cases in point concerning the validity of an agreement to make a contract in the future: *Jenkins v. King* (Ind. App.), 61 N. E. (2d) 474, an agreement to make an agreement cannot be enforced; *Fisher v. Long* (Ky.), 172 S. W. (2d) 574, there is no legal obligation if an essential element of the contract is reserved for future agreement; *DiGiovanni v. Garfinkle,* 42 N.Y.S. (2d) 414, where there is merely an agreement to agree on vital elements of a contract the contract is unenforceable; *Cowan v. Selmon* (Ala.), 13 So. (2d) 190, an agreement to enter into a contract upon terms to be afterwards settled is incomplete on its face and amounts to nothing; *Radford v. McNeny* (Tex. Com. of App.), 104 S. W. (2d) 472, unless an agreement to make a future contract is definite and certain on all subjects to be embraced it is nugatory; *Wallace v. Mertz* (Ind. App.), 156 N. E. 562, an agreement to make an agreement is unenforceable; *Rosenfield v. U. S. Trust Co.* (Mass.), 195 N. E. 323, an agreement to reach an agreement imposes no obligation on the parties thereto; *Duffield & Co. v. Ellsworth,* 255 N.Y.S. 716, a contract for publication of a book on a date to be mutually agreed upon held to create mere agreement to agree resulting in failure of contract where parties never agreed as to date; *Wade v. Lutterloh* (N. C.), 144 S. E. 694, a contract to enter into a future contract must specify all material and essential terms of future contract; *Fly v. Cline* (Calif.), 193 Pac. 615, unless the agreement to execute a future contract is definite and certain upon all objects to be embraced, so that nothing is left for future

negotiation, it is nugatory; *Lucier v. Town of Norfolk* (Conn.), 122 Atl. 911, an agreement to make a contract upon such terms as may later be agreed upon creates no obligations.

See, also:

1500 Sherman Avenue etc. Corp. v. Perkovic, 255 Ill. 518.

TO BE SPECIFICALLY ENFORCEABLE IN EQUITY, THE TERMS OF A CONTRACT MUST BE EXPRESSED WITH CERTAINTY.

Restatement of the Law of Contracts, Section 360, Uncertainty of Terms:

"Specific enforcement will not be decreed unless the terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions under which performance is due."

Noonan v. Mott, 194 N.Y.S. 502, aff. 194 N.Y.S. 962:

This was a motion for judgment on the pleadings by defendant. Plaintiff sued for specific performance of an agreement to enter into a lease upon which the plaintiff had paid $5000.00. Defendant admitted execution of the agreement and the receipt of $5000.00, and that he had not returned any part thereof. Defendant claimed plaintiff was not entitled to specific performance because the agreement was not a lease and did not contain terms and conditions of the proposed lease. The agreement provided for the incorporation into the lease of the "usual clauses contained in long-time leases with respect to defaults, insurance,

public ordinances, etc., and covenant against nuisances, and appropriate clauses requiring the tenant to keep the premises in proper repair during the continuance of the lease and such other usual and appropriate clauses as shall be agreed upon." In its decision, the court says:

> "The term 'usual clauses' is without meaning, because there are not set or standard clauses adopted by all persons who draw leases.
>
> "The provision in the writing which relates to the incorporation of the 'usual clauses contained in long-time leases' might be regarded as of no effect but we are then met with the provision 'for such other usual and appropriate clauses as shall be agreed upon.' "

The court says that this paragraph must be given effect, and

> "the effect which must be given to it is that the parties intended the final lease to contain provisions relating to defaults, insurance, public ordinances, etc., and providing for many other necessary and appropriate matters. In practice there are as many provisions relating to leases as there are parties and lawyers drawing them."

The court further says:

> "An infinite variety of questions suggest themselves as flowing from the clause referred to above. The parties intended that many matters should be threshed out and subsequently incorporated in the lease, which was to be an important long-time lease for a period of twenty-one years. The parties intended to work out and agree upon many important provisions, which, in a general

way, they regarded as essential elements of the lease. In other words the parties signed a writing by which they agreed to make a lease. The terms of the lease, they did not define, though intending to arrive at a settlement of the terms in the future. Such a writing is an agreement to make a lease; not in law such a contract that it can be made the basis of an action for specific performance to enforce it." (Citing cases.)

The defendant's motion for judgment on the pleadings was granted.

In *Herley, Inc. v. Harsh, et al.* (Ohio), 22 N. E. (2d) 515, the court held that the purported contract involved was so incomplete and indefinite as to material terms that specific performance could not be decreed. The agreement provided, among other things:

"It is understood that a regular and customary form of lease shall be entered into which shall provide, among other things * * *"

With reference to this particular clause the court says:

"No evidence definitely establishes that there is a 'regular and customary form of lease' used in Toledo, and evidence as to the forms used does not warrant the inference that there is a 'customary form' which meets the legal requirements of certainty, uniformity and generality necessary to establish a custom recognized by law."

Continuing the court says:

"Just what the parties alluded to by the words 'which shall provide, among other things' is like-

wise uncertain. It may refer to the other things which would appear in 'a regular and customary form of lease,' or it might equally be inferred that the parties might have in mind other things not mentioned or referred to in this contract which they would incorporate in the lease when they came to draw it."

In *McLean et al. v. Fox* (Ohio), 177 N. E. 913, the court says:

> "We think it is fundamental that specific performance will not be granted to enforce a contract unless the contract makes the precise act, which is to be done, clearly ascertainable."

The court also points out that performance is not enough if the contract is too indefinite to be capable of specific performance.

In *Conas v. Sullivan et al.* (Mass.), 145 N. E. 529, the court says:

> "There cannot be specific performance of anything short of a completed contract. The bargain must be determined by a meeting of minds as to the essential terms before there can be a contract. No vital factors of it can be left to future negotiation. It must be wholly settled as to obligation and duty imposed before it can be ordered to be executed by chancery."

In *Daubmeyer v. Hunter* (Fla.), 98 S. 69, the court points out that specific performance of a contract for the lease of land is not a matter of right in either party, but a matter of sound discretion in the court. The court further says:

"It is fundamental that specific performance will not be enforced where the contract is not definite and certain as to essential terms and provisions and is incapable of being made so by the aid of legal presumptions or evidence of established customs." (Citing cases.)

CONTRACT FOR SERVICES—LACK OF MUTUALITY OF REMEDY.

There are numerous decisions involving contracts for personal services wherein the person by whom services are performable is the complainant. In 135 *A.L.R.* p. 305, it is pointed out that:

"The rule denying specific performance of a contract of service where the employee is the complainant is in fact inseparable from the fundamental reason for its existence. Thus, because of the lack of mutuality of remedy it is ordinarily held that equity will refuse to decree specific performance of a contract for services so long as it remains executory, wherever it creates a duty from the plaintiff of such a confidential or personal nature that the court could not have enforced it at the instance of the defendant." (Citing cases.)

See, also:

Solinsky et al. v. McPherson et al. (C.C.A. 9th), 45 F. (2d) 778;

Turley v. Thomas, 31 Nev. 181, 101 P. 568;

Moore et al. v. Heron et ux. (Cal.), 292 P. 136.

THE MEMORANDUM REQUIRED BY THE STATUTE OF FRAUDS WILL NOT SATISFY THE STATUTE WHERE ANY PART OF THE INTENDED CONTRACT IS LEFT TO FURTHER NEGOTIATION.

The defendants contend that the contract herein sued upon shows on its face that it is merely a preliminary agreement, and that further negotiations were clearly intended by the parties before any binding contract would become operative. If this written instrument upon which this action is brought contains provisions wherein it is provided that the parties will further negotiate, and of this it appears there can be no dispute, then it is clear that this written instrument is not sufficient under the statute of frauds. The rule is clearly expressed in Pomeroy's Specific Performance of Contracts, 3rd Edition, page 208 et seq., Section 86 as follows:

> "The memorandum must contain the substantive terms of a concluded contract, as has already been shown. It will not satisfy the statute as being 'the agreement or a note or memorandum thereof in writing', where any part of the intended contract—i. e., of the very contract of which it purports to be a memorandum—is left to further negotiation and a fortiori when the entire arrangement is still in the condition of negotiation so that one party may withdraw; or where it leaves any term or terms of the contract for future settlement; or it contains only certain matters which have been agreed upon as the preliminaries to, or basis of, the intended contract, and not the final contract itself."

> "It has been held in so many cases that it may be deemed elementary that the writing must in-

clude all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it shall completely evidence the contract which the parties made."

Blackmore-Danzig v. Silsbee, 225 N.Y.S. 767, 773.

PROVISION IN PRELIMINARY AGREEMENT FOR RENTAL IS TOO VAGUE AND UNCERTAIN FOR SPECIFIC PERFORMANCE.

The clause in Paragraph 9 of the September 24, 1945 document requiring lease to provide for a guaranteed minimum income from entire building, of sufficient to cover "Taxes, upkeep, insurance, interest on borrowed money and to amortize cost of building" is too vague for specific performance,—no test as to what taxes, general or special; no test as to how "upkeep" shall be computed or determined, nor as to who shall decide what "upkeep" shall consist of, etc. No basis or test as to amount of insurance to be carried, hence no basis for amount of premiums to be paid; no basis for ascertainment of amount of "interest on borrowed money"; no statement of what the "borrowed money" refers to; no test as to limit or amount thereof; no test as to amount required to amortize cost of building in 20 years; no statement as to first cost (except mere estimate of $800,000.00).

Further, it will be observed that as guaranteed minimum income the above clause purports to provide that

"total annual income from the entire building" will amount to at least sufficient to cover the items listed. Inasmuch as the proposed lease was only on a part of the building, i. e., it did not include eight store spaces on Virginia Street and three store spaces on First Street, a question of grave importance immediately arises as to whether the guaranteed total income clause was intended to apply against the "entire building" or only to the portion proposed to be leased to plaintiff and Charles W. Mapes, Jr. The rental from the eleven store spaces taken (for sake of argument) at $1000.00 per month each, would be $11,000.00 per month or $132,000 per annum. It is impossible to determine from the said document whether such item was intended to be included or excluded. If included, then Denson and Mapes as guarantors would be put in the position of guaranteeing income from a substantial portion of the building to which their lease did not extend. If not included, how reconcile the clause "from the entire building"?

Here again, the authorities elsewhere cited herein on uncertainty are applicable to the above. Additionally we cite:

> "To warrant a decree of specific performance thereof, a contract must be definite and certain, and free from doubt, vagueness, and ambiguity, in its essential elements and material terms. Clearness is required. The terms of the contract must be so clear, definite, certain, and precise, and free from obscurity and self-contradiction, that neither party can reasonably misunderstand them, and the court can understand and interpret them,

without supplying anything or supplanting vague and indefinite terms by clear and definite ones through forced or strained construction."

58 *C. J.*, 930, Sec. 96 and Notes 7-18 citing, with other cases:

Shaw v. King (Cal.), 218 P. 950.

See, also:

Pomeroy's Spec. Performance, 3rd ed., 376, Sec. 145;

Id. p. 406, Sec. 159;

Id. p. 408, Sec. 160;

Boulenger v. Morrison (Cal.), 264 P. 256.

Cooperative Assn. v. Phillips, 56 Cal. 539, 547-548.

So, in the case infra involving a contract to lease for ten years at an "average monthly rental of $845.00 per month to be graduated" was held too vague for specific performance,—it not being shown how the rental was to be graduated.

Meyer v. Lincoln Realty Co. (Cal.), 113 P. 333.

In the case infra the alleged contract was to pay for plaintiff's services in the stock of the corporation, but contract did not designate the number of shares, and it was held that it was not a proper subject for specific performance.

Oliver v. Little, 31 Nev. 476, 103 P. 240.

Insurance, amount not stated, nor right of parties to proceeds in case of loss. See:

Blackmore-Danzig Co. v. Sillsbee, 225 N.Y.S. 767.

Where matter of a new store front, payment for heating and other similar matters had not been agreed upon, there was no binding agreement to lease store.

Rosenfield v. U.S. Trust Co. (Mass.), 195 N.E. 323.

See, also:

West etc. Corp. v. Adelman (N.J.), 152 A. 196.

In the case infra the court, considering an uncertain contract, referred to the rule being elementary that specific performance would not be enforced unless the contract not only contained all the material terms, but also expresses each in a sufficiently definite manner.

Reymond v. Laboudigue (Cal.), 84 P. 189, 190.

The failure of a contract to provide the rate of interest on a mortgage or deferred payments renders the contract so uncertain as to defeat specific performance.

58 *C. J.* 938, Sec. 101 and N. 76 citing:

Burnett v. Kullak (Cal.), 18 P. 401;

Magee v. McMannus (Cal.), 12 P. 451.

Covenants which leave the amount of price to be fixed by future agreement between the parties have generally been held unenforceable and void for uncertainty and indefiniteness.

30 *A.L.R.* 573—extended note reviewing cases pro and con.

"If the terms of a contract are contradictory and conflict with each other in their effect, and when

there are two different agreements between the parties concerning the same subject matter, the necessary result is an uncertainty which prevents a court of equity from decreeing a specific performance".

Pomeroy's Spec. Performance, 3rd ed., 408, Sec. 160.

THE SEPTEMBER 24, 1945 DOCUMENT IS UNCERTAIN AS TO ANY REMEDIES AVAILABLE IN THE EVENT OF DEFAULT IN PAYMENT OF RENTAL, I.E., WHETHER LEASE SHOULD BE TERMINATED, ETC.

Our contention as to uncertainty respecting other features of the so-called agreement of September 24th, and the argument and authorities elsewhere made and cited apply here. Said agreement contains nothing as to what remedies are available to either upon default by the other. We add:

In the case involving an alleged uncertain contract, the court said

"What could the court direct or provide in its decree with reference to the failure of the purchaser to make his payments or to pay the interest?"

Reeves v. Littlefield (Mont.), 54 P. (2d) 879, 882.

See, also:

Manning v. Ayres (C.C.A. 7th), 77 F. 690, 696;
Schmidt v. Malarogos (Ohio), 187 N.E. 793.

THE PRELIMINARY AGREEMENT CALLS FOR CONSTRUCTION BY DEFENDANTS OF A LARGE HOTEL BUILDING, ESTIMATED COST $800,000.00, WITH PLAINTIFF AND CHARLES W. MAPES, JR. TO OPERATE AND MANAGE SAME.

This, as we believe, would call for continuous supervision by the court during construction if specific performance were decreed, and for performance of personal services in management for the term of the lease. That this will not be done by a court we submit the following:

The law is that a contract which can be performed only by rendering personal services as a contract to manage a theatre, to open, develop or operate a mine, to quarry marble blocks at a specified size, shape and quality, to operate a saw mill, to operate a railway line, to construct a railway line,—all of them are contracts of which specific performance will not be given, since decrees to perform them cannot be enforced by the courts without an expenditure of time and energy which may seem to the court to be excessive.

6 *Page on Contracts,* 2nd ed., 5883, Sec. 3354 and N. 7 et seq.

See, also:

31 *A.L.R.* 507—Note;

164 *A.L.R.* 815—Note.

The case infra, a recent case decided May 13, 1946, was an action seeking specific performance of an agreement for distribution of calculating machines manufactured by the defendant. The court granted the defendant's Motion to Dismiss and plaintiff appealed. After disposing of a number of other contentions, the court said:

"When we come to consider the efficacy of equity to grant relief, we meet our greatest difficulty. It has been the rule that equity will not grant specific performance of a contract so indefinite in its terms as to require continuous policing of performance and when obedience to a decree may not be compelled by ordinary court process."

Bach v. Fiaden Calculating etc. Co. (C.C.A. 6th), 155 F. (2d) 361, 366.

"As a general rule, courts of equity refuse to decree specific performance of a contract where its provisions and stipulations are so multifarious and its obligations are so continuous as to make the effective enforcement of a decree impossible, or require constant and long continued supervision by the courts and further supplemental proceedings in order to enforce the defendant's compliance with the decree and his performance of the constantly recurring duties of the contract. This is particularly true where performance will extend over a considerable period of time and include a series of acts as in the case of a building and construction contract."

49 *Am. Jur.* 85, Sec. 70 and N. 5, 6, 7.

See, also:

Stanton v. Singleton (Cal.), 59 P. 146; 47 L.R.A. 334.

Query: Could Mrs. Mapes compel specific performance of execution of a lease by Mapes, Jr. and Denson, which lease called for the operation by the latter of the hotel and hence call for the performance of their personal services? If not, then Denson and

Mapes, Jr. would have no remedy for specific performance against Mrs. Mapes because there would no mutuality of remedy. See:

65 *A.L.R.*, 45—extended note;

Jacksonville Hotel Co. v. Dunlap Hotel Co., 264 Ill. App. 279, 321.

The testimony of plaintiff (R. pp. 189, 861) is: "I was really to be the manager of it (the hotel)".

If the foregoing be accepted as true, then it would appear plaintiff is out of court on his own showing, because admittedly no specific performance could lie by the defendants as against plaintiff P. G. Denson, because the management and conduct of the hotel calls for personal services, and it is equally well settled that equity cannot take jurisdiction unless the contract is of such a nature that it can be specifically enforced by each of the parties against the other, i.e., that there must be mutuality. See:

Cooper v. Dena, 21 Cal. 403.

See also further authorities to same point:

Marshall v. Thorson (Colo.), 197 P. 754, 755—an hotel case and closely in point;

Folquet v. Woodburn Public School (Ore.), 29 P. (2d) 554, 555;

Blanchard v. Detroit etc. Co. (Mich.), 18 A.R. 142, 150;

Moody v. Crane (Ida.), 199 P. 652, 658;

Tri-State Const. Co. v. Watts (Ark.), 237 S.W. 690;

Clarno v. Grayson (Ore.), 46 P. 426, 437;

Standard etc. Co. v. Siegel-Cooper Co. (N.Y.), 68 A.S.R. 753, 754—important case;
140 *A.S.R.* 59—Note; Id., 76—Note;
Allegheny Club v. Bennett (C.C.Pa.), 14 F. 257, 258;
Ross v. Union P. R. Co., 20 Fed. Cas., p. 1245, No. 12080;
68 *A.S.R.* 755, 760, 761—Note;
Los Angeles etc. Co. v. Occidental Oil Co. (Cal.), 78 P. 25, 27.

PLAINTIFF'S AMENDED COMPLAINT AND TESTIMONY SEEK SPECIFIC PERFORMANCE OF AN AGREEMENT UNDER WHICH HE IS TO PERFORM PERSONAL SERVICES, VIZ., MANAGE AND CONDUCT SAID HOTEL. DEFENDANTS COULD NOT COMPEL PLAINTIFF TO PERFORM SUCH PERSONAL SERVICES. HENCE NO MUTUALITY OF REMEDY.

"* * * it is a fundamental principle in the law of specific performance that for the relief to be granted mutuality of remedy must exist."

58 *C. J.*, 866, Sec. 19 and N. 17, citing long list of cases.

See also:

Pomeroy's Spec. Performance, 3rd ed., 422, Sec. 165;
Gavina v. Smith (Cal.), 148 P. (2d) 890.

The defendants could, as we believe, under no circumstances compel specific performance by the plaintiff of the September 24th document, if for no other reason, in that there is no mutuality because the defendants could not compel the plaintiff to manage

and operate the hotel because that would be requiring him to perform personal services.

> "The remedy of specific performance must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other."
>
> *Hupp v. Lawler* (Cal.), 288 P. 801, 803.

The contract purports to require of the Mapes, Jr.-Denson side personal services in the operation of the hotel. The law is that a contract which can be performed only by rendering personal services as a contract to manage a theatre, to open, develope or operate a mine, to quarry marble blocks at a specified size, shape and quality, to operate a saw mill, to operate a railway line, to construct a railway line, are all of them contracts of which specific performance will not be given, since decrees to perform them cannot be enforced by the courts without an expenditure of time and energy which may seem to the court to be excessive.

> 6 *Page on Contracts,* 2nd ed., 5883, Sec. 3354 and N. 7 et seq.

See also:

> 31 *A.L.R.,* 507—Note.

In the case infra, it appeared plaintiff orally agreed to bequeath her property to defendant on the latter's agreeing to marry plaintiff and manage her property, and the court held that specific perform-

ance was not available to the defendant, since the defendant could not be compelled specifically to manage plaintiff's property.

O'Brien v. O'Brien (Cal.), 241 P. 861, 865.

For exhaustive treatment on the subject of mutuality, see:

6 *Page on Contracts,* 2nd ed., 5824, Sec. 3308 et seq.

PLAINTIFF'S SO-CALLED PLEA (SEE PARAGRAPHS IX, X, XI AND XII, AMENDED COMPLAINT) OF WAIVER OF THE CLAUSE IN THE SEPTEMBER 24, 1945 DOCUMENT REQUIRING PRECEDENT WRITTEN APPROVAL BY BOTH PARTIES OF PLANS AND SPECIFICATIONS BEFORE ANY LEASE SHALL BECOME EFFECTIVE, AND PLAINTIFF'S CLAIM OF PART PERFORMANCE AND ESTOPPEL—ARE INSUFFICIENT FOR WANT OF NECESSARY FACTS.

The Nevada statute provides:

> "Every contract for the leasing for a longer period than one year, or for the sale of any land, or any interest in land, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party by whom the lease or sale is to be made."
>
> Vol. 1 *N. L. C.,* Sec. 1529.

It will be noted the statute supra makes the contract "void."

In the case infra, the Washington Statute made contracts of a similar nature "void". On the trial, it was sought to show that there had been a waiver and estoppel, etc., but the Washington Supreme Court

held that because of the provision making the contract void, no such defense was available, in absence of part performance.

Chambers v. Kirkpatrick (Wash.), 253 P. 1074, 1075, reversed on other grounds, 259 P. 878.

See also:

49 *Am. Jur.*, 730, Sec. 425.

"If in an action on an oral contract plaintiff relies on part performance, receipt, and acceptance, or other circumstances to avoid the statute or bring the case within an exception thereto, he must allege such facts as will effect that purpose."

37 *C. J. S.*, 798, Sec. 27 and N. 56, citing cases.

"A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal.

To establish an estoppel precluding reliance on statute of frauds as defense to action for breach of oral contract, essential terms of contract must be shown with reasonable certainty and it must be shown that representations were made that invalidity of contract would not be asserted, together with facts that party urging estoppel has thereby changed his position to his detriment, and that intention to make change was known at time by one making representation." (syll.)

Albany etc. Co. v. Euclid etc. Co. (Cal.), 85 P. (2d) 471.

For opinion covering same subject matter see:
Idem., pages 472-473, citing cases.

To same effect:
Little v. Union Oil Co. (Cal.), 238 P. 1066, 1068.

The modification alleged or attempted to be alleged by the plaintiff of the September 24th written document are modifications in the nature of recession by the defendants of their rights under the original agreement, while no new obligations are required of or are to be performed by the plaintiff. This is insufficient for specific performance.

Bamberger Co. v. Certified Productions (Utah), 48 P. (2d) 489, 492-493.

The case infra involved claimed modifications of a written lease which had previously been made for the period of 10 years. Plaintiff sued defendant corporation as a lessee for restitution of the premises for default, etc., in payment of the rent. The defendant set up that there were supplemental agreements which modified the original lease. It appeared these supplemental agreements were oral and plaintiff moved to strike same. Judgment went for plaintiff and defendant appealed, and in reversing, the Utah Supreme Court said, *inter alia:*

> "As a broad general doctrine it may be announced that a contract required by the statute of frauds to be in writing cannot be modified by subsequent oral agreement. * * * Most of the courts of this country hold, as a general rule, that an oral modification of a contract required

by the statute of frauds to be in writing will not be permitted."

Bamberger Co. v. Certified Productions (Utah), 48 P. (2d) 489, 491-492.

See also:

17*A.L.R.*, 10.

Where the oral contract is regarded as void under the statute of frauds, the defense of estoppel, waiver, etc. may not be set up, in absence of part performance of such oral contract.

37 *C. J. S.*, Sec. 246 and Note 94 et seq.

"Part performance relied on to take the case out of the statute of frauds must have been done strictly with reference to the contract; if referable to anything else, it is not available."

27 *C. J.*, 347, Sec. 429 and Note 41 citing long list of cases.

NO FACTS SHOWING ESTOPPEL ARE PLEADED.

The case infra was an action to recover damages for breach of contract involving an oral contract whereby it was alleged defendant agreed to furnish plaintiff for a period of 5 years without charge sufficient horses to cultivate the land leased by a written lease by defendants to the plaintiff. The trial court allowed evidence as to the oral agreement over defendants' objection that the agreement was void under N.C.L., Sec. 1533 re agreement not performed within

one year. The trial court decided for plaintiff, but this was reversed on appeal, primarily on the ground that the doctrine of part performance relied upon by the plaintiff did not apply to contracts of the character in question, but only contracts relating to land. It was then contended on appeal that there was an estoppel by reason of acts of plaintiff done in reliance upon the oral agreement, but the court held that the facts fell short of showing any estoppel and reversed the judgment in favor of the plaintiff. Subsequently, a petition for rehearing was made and followed by an opinion denying same, from which it appears that the plaintiffs contended solely on the rehearing for an estoppel, based upon expenditures made by them in conducting their operations under their lease, the loss incident to defendants' refusal to furnish horses. Plaintiffs contended that if the outlay would not support the plea of part performance it should estop the defendant company from urging the statute of frauds. But the court ruled against plaintiff, saying the operations relied upon did not induce the change of position by plaintiffs but was the result of change of position. The court commented upon the failure of Brooks as to any change of position done in reliance upon the oral agreement. The trial court was reversed.

Nehls v. William Stock Farming Co., 43 Nev. 253, 184 P. 212, 185 P. 563.

In the case infra plaintiffs, having an established delivery business, took two contracts to carry United

States mail for a period of 4 years and made an oral agreement with defendants whereby defendants undertook to carry it for the remaining period and executed a written contract to that effect to plaintiffs who thereafter changed their residence, sold a part of their teams and took other teams away. It was held in an action for breach, where it was not shown that it was necessary for plaintiffs to change their residence after making the agreement, or that defendants were informed, etc. that they intended to make such changes, or that defendants had knowledge of any necessity therefor, that there was no estoppel. The court said:

> "In the case at bar, it is not alleged that it was necessary for plaintiffs, or either of them, to leave Susanville when they ceased to carry the mails, or that they informed defendants that they intended to do so, or that they intended to change their residence or condition in any respect because of the proposed transfer, or that the defendants had knowledge of any such necessity or purpose. There is no evidence tending to show these facts, supposing them to have been pleaded, except the testimony of J. C. Long that he told the defendants before making the oral agreement that he had to go away because of his wife's health and that after the agreement was made they sold two rigs and four horses and took the other equipment away 'on the strength of the agreement that we made with the defendants'. He did not say that the defendants were informed at the time of making the agreement that they intended to do

> this, or that they, at that time, had such intention. Or that J. C. Long would not have gone away for the sake of his wife's health, even if they had not made the agreement. There is therefore nothing upon which the supposed estoppel can rest."
>
> *Long v. Long* (Cal.), 122 P. 1077, 1079.

In the case infra the court held that the contract presented was void under the statute in that it described the property only as "160 acres, more or less" in a certain township and range, county and state. Appellant apparently recognized the force of the decisions and had alleged facts designed to set up estoppel; that relying "upon the good faith and integrity of the defendant and his ability and willingness to perform * * * said contract" he, the appellant, spent time and money in cruising the timber on the land and in obtaining rights of way to it. But the contract being void, this was not sufficient to remove the ban of the statute of frauds. The case is comparable to the situation here, where the written document (as we contend) is void for uncertainty in a number of particulars, and the plaintiff's plea that he relied upon the good faith, etc. and performed divers things, is within the rule of the Washington case where it was said:

> "But the contract being void, this was not sufficient to remove the ban of the statute of frauds."
>
> *Mortenson v. Cruikshank* (Wash.), 101 P. (2d) 604, 605.

"The mere promise of the plaintiff to reduce the oral contract to writing, and her failure or refusal to do so did not constitute a fraud".

O'Brien v. O'Brien (Cal.), 241 P. 861, 865.

"A parol promise to lease certain real estate for a term of years, on which defendant relied in purchasing a stock of goods on the premises, being a mere promise as to future action with respect to a right to be acquired under an agreement not yet made, is insufficient to estop plaintiff from denying the validity of such contract under the statute of frauds."

Dechenbach v. Rima (Ore.), 78 P. 666.

"An estoppel cannot be relied upon to give effect to a contract absolutely void."

27 *C. J.* 340, Sec. 425 and N. 72 and cases cited.

COMPLAINT MUST ALLEGE FACTS SHOWING CONTRACT SOUGHT TO BE ENFORCED WAS JUST AND REASONABLE TO THE DEFENDANT.

The case infra was for specific performance of an executory contract to give to the plaintiff a lease upon certain property. The complaint alleged in the language of the statute that the consideration was just and reasonable, etc., but the court held this was insufficient and for that reason alone reversed the case. The complaint should set forth the facts which show the consideration provided for in the contract sought

to be enforced is adequate and that the contract is just and reasonable to the defendant.

Joyce v. Thomasini (Cal.), 142 P. 67, 68-69.

For the reasons above discussed and on the authorities cited, the defendants and appellees ask that the judgment and decree of the trial court be in all respects affirmed.

Dated, Reno, Nevada,
December 10, 1947.

Respectfully submitted,
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